80-644

No.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

G.D. SEARLE & COMPANY,

Petitioner,

vs.

SUSAN COHN and WALTER COHN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RAYMOND M. TIERNEY, JR.
SHANLEY & FISHER,
Attorneys for Petitioner,
550 Broad Street,
Newark, New Jersey 07102.
(201) 643-1220

Adams Press Corp., 5 Commerce Street, Newark, N. J. 07102—(201) 623-8611

Questions Presented

1. Whether the application of New Jersey's tolling statute, N.J.S.A. 2A:14-22, to petitioner, a foreign corporation amenable to suit in New Jersey, denies petitioner its right to due process under the Fourteenth Amendment to the United States Constitution.

2. Whether the application of New Jersey's tolling statute, N.J.S.A. 2A:14-22, to petitioner, a foreign corporation amenable to suit in New Jersey, denies petitioner its right to equal protection of the laws under the Fourteenth Amendment to the United States Constitution.

3. Whether the application of New Jersey's tolling statute, N.J.S.A. 2A:14-22, to petitioner, a foreign corporation engaged solely in interstate and not intrastate commerce in New Jersey, constitutes the imposition of a burden of interstate commerce forbidden by the Commerce Clause of the United States Constitution.

Parties to the Proceedings*

Susan Cohn and Walter Cohn, Plaintiffs-Respondents.

G. D. Searle & Company, Petitioner-Defendant.

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* The State of New Jersey is not a party to the within action. Neither the United States District Court for the District of New Jersey nor the United States Court of Appeals for the Third Circuit has certified to the Attorney General of the State of New Jersey the fact that the constitutionality of a statute of that state was drawn into question pursuant to the United States Supreme Court Rules, Rule 28. However, Petitioner herein has served notice upon the Attorney General of the State of New Jersey of the within matter and has notified him that 28 U.S.C. §2403(b) may be applicable. Additionally, the constitutionality of the same state statute was at issue in the case of *Velmohos* v. *Maren Engineering Corp.*, 168 N.J. Super. 520, 403 A.2d 927 (App. Div. 1979), *aff'd*, 83 N.J. 282, 416 A.2d 372 (1980). In that case the New Jersey Attorney General was notified of the fact that the constitutionality of the statute was at issue and he did not appear. 168 N.J. Super. at 522, 403 A.2d at 928.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, G. D. Searle & Company, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Circuit Court of Appeals for the Third Circuit entered in this proceeding on July 23, 1980.

Opinions Below

Petitioner requests review of the decision of the United States Court of Appeals for the Third Circuit (Third Circuit) reported sub nom. *Cohn* v. *G. D. Searle & Co.* ——

F.2d —— (Docket Nos. 79-2405 & 79-2406, 3rd Cir. July 23, 1980). The opinion is reproduced in the Appendix at p. 1a, *infra.*

The decision of the United States District Court for the District of New Jersey appears at 447 F. Supp. 903 (D. N.J. 1978). It is included in the Appendix at p. 28a, *infra.*

Jurisdiction

The judgment of the Third Circuit was entered on July 23, 1980.[1] A copy of that judgment is included in the Appendix at p. 26a, *infra.* This petition for certiorari has been filed within 90 days of the date of said judgment. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1), which states:

> "cases in the courts of appeals may be reviewed by the Supreme Court . . .
>
> (1) By-writ of certiorari granted upon a petition of any party to any civil or criminal case, before or after rendition of judgment or decree. . . ."

Constitutional Provisions, Statutes and Rules Involved

The Fourteenth Amendment to the United States Constitution, Section 1:

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[1] The within matter had been consolidated and decided by the Third Circuit in conjunction with the case of *Hopkins* v. *Kelsey-Hayes, Inc.* (Docket No. 79-1881, 3rd Cir. July 23, 1980). The defendant in that case has also petitioned this Court for the issuance of a writ of certiorari.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Constitution of the United States, Art. 1, §8, Cl. 3 (the Commerce Clause):

> "The Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; ..."

The New Jersey "Tolling Statute", N.J.S.A. 2A:14-22:

> "If any person against whom there is any of the causes of action specified in sections 2A:14-1 to 2A:14-5 and 2A:14-8, or if any surety against whom there is a cause of action specified in any of the sections of article 2 of this chapter, is not a resident of this state when such cause of action accrues, or removes from this state after the accrual thereof and before the expiration of the times limited in said section, or if any corporation or corporate surety not organized under the laws of this state, against whom there is such a cause of action, is not represented in this state by any person or officer upon whom summons or other original process may be served, when such cause of action accrues or at any time before the expiration of the times so limited, the time or times during which such person or surety is not residing within this state or such corporation or cor-

porate surety is not so represented within this state shall not be computed as part of the periods of time within which such an action is required to be commenced by the section. The person entitled to any such action may commence the same after the accrual of the cause therefor, within the period of time limited therefor by said section, exclusive of such time or times of nonresidence or nonrepresentation."

New Jersey's Long-Arm Rule, N.J.R. 4:4-4:

"Service of summons, writs and complaints shall be made as folows:

• • •

(c) Corporations, Partnerships, and Associations.

(1) Corporations. Upon a domestic or foreign corportaion, by serving, in the manner prescribed, in paragraph (a), either an officer, director, trustee, or managing or general agent; or any person authorized by appointment or by law to receive service of process on behalf of the corporation; or the person at the registered office of the corporation in charge thereof. If service cannot be made upon any of the foregoing, then it may be made upon the person at the principal place of business of the corporation in this State in charge thereof, or if there is no place of business in this State, then upon any servant of the corporation within this State acting in the discharge of his duties. If it appears by affidavit of plaintiff's attorney or of any person having knowlledge of the facts that after diligent inquiry and effort personal service cannot be made upon any of the foregoing and if the corporation is a foreign corporation, then, consistent with due process of law, service may be made by mailing, by registered or

> certified mail, return receipt requested, a copy of the summons and complaint to a registered agent for service, or to its principal place of business, or to its registered office."

New Jersey's Statute of Limitations for Personal Injury Actions, N.J.S.A. 2A:14-2:

> "Every action at law for an injury to the person caused by the wrongful act, neglect or default of any person within this state shall be commenced within 2 years next after the cause of any such action shall have accrued."

Statement of the Case

This is a products liability/negligence action brought by Mrs. Cohn, a user of the oral contraceptive, Enovid, and her husband against its manufacturer, G. D. Searle & Company (Searle). Mrs. Cohn's use of Enovid allegedly resulted in a cerebrovascular accident which she suffered in 1964. Sometime in 1969 or 1970, the plaintiffs became aware of a possible link between Mrs. Cohn's stroke and her ingestion of Enovid, and, although not at issue in this Petition, the District Court in an unpublished opinion concluded that plaintiffs had discovered their cause of action by 1970.

Plaintiffs commenced this action in 1974 by the filing of a complaint in the Superior Court of New Jersey. Service was effected on Searle under New Jersey's long arm rule, N.J.R. 4:4-4(c)(1). No difficulty in obtaining the name of Searle or in effecting service was claimed. Searle removed the case to the United States District Court for the District of New Jersey pursuant to 28 U.S.C. §1441, invoking the diversity of citizenship jurisdiction of that Court under 28 U.S.C. §1332(a).

Searle thereafter moved for summary judgment on the ground that plaintiffs' claims were barred by the applicable two-year statute of limitations, N.J.S.A. 2A:14-2. In opposition, plaintiffs argued that the statute of limitations was no bar to their complaint because New Jersey's tolling statute, N.J.S.A. 2A:14-22, tolls the statute of limitations in any action against a foreign corporation, such as Searle, which is not represented in this state by any person or officer upon whom summons or other original process may be served.

Searle, a Delaware corporation with its principal place of business in Illinois, conducted an entirely interstate and not intrastate pharmaceutical business in New Jersey. Accordingly, Searle argued, *inter alia,* that the tolling statute did not apply to it since it was amenable to valid long-arm service of process. Alternatively, Searle argued that if the tolling statute were applicable to it, its rights of equal protection and due process guaranteed by the Fourteenth Amendment to the United States Constitution were violated.

The District Court, whose opinion appears at 447 F. Supp. 903 (D.N.J. 1978) and is included in the Appendix at p. 28a, held that the tolling statute applied to Searle. It also held, however, that such an application to a foreign corportaion amenable to service of process under the long-arm rule served no rational purpose and was, therefore, an unconstitutional denial of equal protection. The District Court opinion further stated that if the tolling statute was designed to compel foreign corporations to do business in New Jersey, it also imposed an unlawful burden on interstate commerce under the Commerce Clause. 477 F.Supp. at 911, n.17.

On appeal to the Third Circuit, Searle argued that the application of the tolling provision violated both equal

protection and due process of law, and further, when applied to a corporation engaged solely in interstate commerce, violated the Commerce Clause.

Just prior to the Third Circuit's consideration of the *Cohn* matter, the New Jersey Supreme Court rendered its decision in *Velmohos* v. *Maren Engineering Corp.*, 83 N.J. 282, 416 A.2d 372 (1980). In that opinion, New Jersey's highest court rejected a foreign corporation's constitutional claims of violation of due process and equal protection by denying it the defense of the statute of limitations although it was at all times subject to the State's jurisdiction. Thus, under *Velmohos*, an unregistered and unlicensed foreign corporation might never assert such a defense. It should be noted that Maren Engineering Corporation has docketed an appeal and has filed a Jurisdictional Statement in that matter with this Court.

The Third Circuit in *Cohn*, following the approach chosen by New Jersey's highest court, reversed the District Court and concluded that the application of the tolling statute to foreign corporations amenable to long-arm jurisdiction, such as Searle, did not deny equal protection or due process. *Searle's Commerce Clause arguments were not addressed.*

Reasons for Granting the Writ

The question of whether a state may subject a foreign corporation, admittedly not registered to do business in that state, to its *in personam* jurisdiction while at the same time denying to that corporation the protection of a statute of limitations afforded all other defendants subject to the state's jurisdiction, consistent with due process and equal protection of the law, is a substanstantial and novel one. Further, the question of whether a state may condition the

implementation of a valid statute of limitations defense by a foreign corporation, engaged solely in interstate commerce, yet subject to that state's *in personam* jurisdiction under its long-arm rule, by compelling qualification to do business in that state with attendant tax and reporting burdens, consistent with the Commerce Clause, is a substantial and novel one. These important questions of federal law have not been, but should be, addressed by this Court. The New Jersey Supreme Court's decision in *Velmohos* v. *Maren Engineering Corp.*, 83 N.J. 282, 416 A.2d 372 (1980), and the Third Circuit's adoption of that decision in the instant case causes confusion within the Circuit and conflicts with the opinions of other state courts of last resort. These considerations require that this Court exercise its discretion and grant a writ of certiorari in this case.

This Court has limited the reach of out-of-state service of process by requiring sufficient minimum contacts with a state so that a suit does not offend "traditional notions of fair play and substantial justice." *International Shoe Co.* v. *State of Washington*, 326 U.S. 310, 316 (1945). In *World-Wide Volkswagen* v. *Woodson*, 444 U.S. 286, 100 S. Ct. 559, 567; 62 L.Ed. 2d 490 (1980), this Court described these limitations more concretely. Under the Due Process Clause, it is not unreasonable for a state to subject a foreign corporation to its jurisdiction "if the sale of a product of a manufacturer . . . [arose] from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its product in other states. . . ." *See also, Oswalt* v. *Scripto, Inc.*, 616 F.2d 191, 198-199 (5th Cir. 1980).

In *Shaffer* v. *Heitner*, 433 U.S. 186, 202 (1977), this Court recognized that a foreign corporation doing business in a state could be deemed "present" in that state, and thus subject to service of process. Mr. Justice Marshall wrote for the Court:

> "This basis for *in personam* jurisdiction over foreign corporations was later supplemented by the doctrine that a corporation doing business in the state could be deemed 'present' in the State. . . ."

Concomitantly, the New Jersey long-arm rule, N.J.R. 4:4-4 (c)(1), permits service of process upon nonresident defendants "to the uttermost limits permitted by the United States Constitution." *Avdel Corporation* v. *Mecure*, 58 N.J. 264, 268, 277 A.2d 207, 209 (1971).

Once New Jersey has determined a foreign corporation to be sufficiently "present" in the state to be amenable to its service of process, it must follow that such a foreign corporation should be afforded the right to plead the defense of the statute of limitations—a defense available to domestic corporations and to other foreign corporations also amenable to service through long-arm jurisdiction but who by chance may also maintain registered agents within the State. Yet in the instant case the Third Circuit has determined that the petitioner corporation was not sufficiently "present" to avail itself of the two-year statute of limitations. By doing so, the Third Circuit has concluded that the statute of limitations will never be available to such a defendant. This novel decision deprives petitioner of its Constitutional rights to due process and equal protection of the law. Such a decision requires review and reversal by this Court.

The purpose of the Equal Protection Clause of the United States Constitution is to prevent irrational and arbitrary discrimination between persons similarly situated. *Reed* v. *Reed*, 404 U.S. 71 (1971). While a state may make rational classifications, a state may not provide that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated

to the objective of that statute. *Reed* v. *Reed,* 404 U.S. at 75-76.

New Jersey's distinction, as applied by the Third Circuit, between petitioner and other foreign corporations, which for business or other considerations may be qualified to do business and maintain a registered agent or be licensed by New Jersey, is arbitrary and has no rational basis. Indeed, plaintiffs never asserted any difficulty in serving Searle. Yet, despite plaintiffs' ease in service of process, Searle is forever barred from asserting the defense of the statute of limitations. Such a discriminatory result falls within the rule of *Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415 (1920), that a classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of legislation, so that all persons similarly circumstanced shall be treated alike." *Accord, Reed* v. *Reed,* 404 U.S. at 76.

Essentially, the rationale of the Third Circuit focused on the presumed difficulties in serving out-of-state defendants. Such reasoning, however, is irrational both on its face and as applied. In New Jersey, the filing of a complaint, naming any defendant, whether in-state or out-of-state, and not the time of service of process, tolls the statute of limitations against all so named. N.J.R. 4:2-2. In focusing on the rule's requirement that plaintiffs attempt in-state service before utilizing long-arm service, the Third Circuit has given judicial approbation to the irrational result of forever precluding the assertion of the statute of limitations by the long-arm defendant, regardless of when the defendant was served or when the complaint was filed —here, at least four years after the cause of action accrued.

If the expressed reason for tolling the statute of limitations for foreign corporations which are not represented within New Jersey is difficulty in effecting service, then

the equal protection clause demands that the length of time that the statute is tolled bear a rational relation to that difficulty. Yet, despite these constitutional requirements, N.J.S.A. 2A:14-22 evinces no relation between the ease or difficulty of service of process upon an out-of-state defendant and the availability of the defense of the statute of limitations to such defendant. As such, it remains arbitrary, bearing no rational relationship to the legislative objective sought to be obtained, and, therefore, is constitutionally infirm.

The Due Process Clause of the United States Constitution similarly demands that the use of state power bear a rational relationship to a legitimate societal interest. *Richardson* v. *Belcher,* 404 U.S. 78, 81 (1971); *Lochner* v. *New York,* 198 U.S. 45, 53 (1905). As the long-arm provision extends the state's reach to out-of-state corporations, the legitimate state interest in denying a distant corporation the benefit of its statute of limitations is correspondingly diminished. N.J.S.A. 2A:14-22, as construed by the courts below, conclusively presumes that foreign corporations without representation in New Jersey are not amenable to service. This presumption, plainly contradicted by the appearance of long-arm defendants, is irrational and is a deprivation of due process of law.

"Statutes creating permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments." *Vlandis* v. *Kline,* 412 U.S. 441, 446 (1973). In *Vlandis,* the state's presumption that an out-of-state student would forever remain an out-of-state resident during the course of study at a Connecticut college was stricken as a denial of due process of law. This presumption financially penalized the plaintiffs in *Vlandis.* By the same token, the Third Circuit's adoption of New Jersey's irrebutable presumption,

as expressed in its 1949 tolling statute, that all out-of-state defendants are not subject to service of process despite their appearance in an action, is also invalid. "[A] statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment." *Heiner* v. *Donnan*, 285 U.S. 312, 329 (1932).

The decision of the Third Circuit upholding the constitutional viability of the 1949 tolling statute as applied to long-arm defendants perpetuates a form of discrimination against foreign corporations engaged in interstate commerce that involves not only equal protection and due process, but, of equal importance, Commerce Clause considerations intertwined with the concepts of fundamental fairness and justice. Under not totally dissimilar circumstances this Court has noted:

> "'[T]raditional notions of fair play and substantial justice' can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage." *Shaffer* v. *Heitner*, 433 U.S. 186, 212 (1977).

The effect of the Third Circuit's opinion in upholding the application of the tolling statute to Searle is to burden unconstitutionally Searle's conduct of interstate business operations.[2] The only mechanism available to Searle to avoid perpetual exposure to stale claims by dilatory plaintiffs in New Jersey is to qualify as a corporation authorized to do business within this state, and thus subject itself to the requirements of not only designating a registered agent, but

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[2] As indicated earlier, the Third Circuit ignored the Commerce Clause argument raised on appeal.

of maintaining an office, complying with various filing and reporting requirements and subjecting itself to state taxation. *E.g.*, N.J.S.A. 14A:13-3 *et seq.*; N.J.S.A. 54:10A-1 *et seq.*; N.J.S.A. 54:10E-1 *et seq.* Such requirements impose upon a foreign corporation engaged totally in interstate commerce an unfair burden not countenanced by this Court's interpretations of the Commerce Clause.[3]

In a series of cases beginning almost 100 year ago with the "drummer" cases and continuing to date, this Court has summarily struck down similar burdens imposed by states on foreign corporations engaged in interstate commerce. *Allenberg Cotton Co., Inc.* v. *Pittman*, 419 U.S. 20 (1974); *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282 (1921); *Sioux Remedy Co.* v. *Cope*, 235 U.S. 197 (1914); *International Textbook Co.* v. *Pigg*, 217 U.S. 91 (1910); *Robbins* v. *Shelby Taxing District*, 120 U.S. 489 (1887). As stated in *Dahnke-Walker Milling Co.* v. *Bondurant*:

> "A corporation of one State may go into another, without obtaining the leave or license of the latter, for all the legitimate purposes of such commerce; and any statute of the latter State which obstructs

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[3] In *Velmohos* v. *Maren Engineering Corp.*, the New Jersey Supreme Court suggested, in a footnote, that "whatever hardship on foreign corporations might be caused by continued exposure to suit can be easily eliminated by the designation of an agent for service of process within the State." 83 N.J. at 293, n.10. *This is simply not so.* Ludicrous as it may appear, there is no method to simply designate an agent for service of process. In order to have an agent for service of process in New Jersey, a foreign corporation must qualify to do business in the state. There is no statutory authority or procedure for designating an agent for service of process independently of or without qualifying the corporation to do business. Qualification and the designation of an agent in turn trigger reporting requirements of business activities annnually and the imposition of a franchise tax liability.

> or lays a burden on the exercise of this privilege is void under the commerce clause." 257 U.S. at 291.

In *Robbins* v. *Shelby Taxing District,* the Court ruled that "the negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce." 120 U.S. at 497. *See,* also, *Memphis Steam Laundry* v. *Stone,* 342 U.S. 389, 392, n. 7 (1952); *Sioux Remedy Co.* v. *Cope,* 235 U.S. 197 (1914); *Lilly & Co.* v. *Sav-On-Drugs, Inc.,* 366 U.S.276 (1961).

It is well established that neither the filing of a charter, the appointment of an agent to receive process nor the payment of a fee may be required of a corporation involved in a state solely in interstate commerce as a prerequisite to the bringing of suit in that state's court to enforce a claim arising out of interstate commerce. As this Court stated in *Lilly & Co.* v. *Sav-On-Drugs, Inc.*:

> "Under the authority of the so-called 'drummer' cases, such as *Robbins* v. *Shelby County Taxing Dist.,* Lilly is free to send salesmen into New Jersey to promote this interstate trade without interference from regulations imposed by the State." 366 U.S. at 278-279.

And as this Court previously enunciated in *Sioux Remedy Co.* v. *Cope*:

> "We think that when a corporation goes into a State other than that of its origin to collect, according to the usual or prevailing methods, the purchase price of merchandise which it has lawfully sold therein in interstate commerce, it is there for a legitimate purpose of such commerce, and that the State cannot, consistently with the limitations arising from the

commerce clause, obstruct or hamper the attainment of that purpose. *If it were otherwise, the purpose of the Constitution to secure and maintain the freedom of commerce by whomsoever conducted could be largely thwarted by the States and the commerce itself seriously crippled.*

* * *

The conditions which the statute imposes are: First, that the company shall file in the office of the Secretary of State an authenticated copy of its charter or articles of incorporation; *second, that it shall appoint a resident agent upon whom process may be served in any action against it* * * * *The second one, respecting the appointment of a resident agent upon whom process may be served, is particularly burdensome, because, as the Supreme Court of the State has said, it requires the corporation to subject itself to the jurisdiction of the courts of the State in general as a prerequisite to suing in any of them; that is to say, it withholds the right to sue even in a single instance until the corporation renders itself amendable to suit in all the courts of the State by whosoever chooses to sue it there. If one State can impose such a condition others can, and in that way corporations engaged in interstate commerce can be subjected to great embarrassment and serious hazards in the enforcement of contractual rights directly arising out of and connected with such commerce.* As applied to such rights we think the conditions are unreasonable and burdensome, and therefore in conflict with the commerce clause." 235 U.S. at 204-205. (Emphasis supplied).

In the instant case, the tolling statute deprives Searle, a foreign corporation involved in New Jersey only in inter-

state commerce, of the benefit of the statute of limitations unless Searle takes certain otherwise unnecessary acts, such as registering to do business in New Jersey and designating an agent, or maintaining an office or manager in this state. In effect, every foreign corporation transacting business in interstate commerce in New Jersey must now take some affirmative act or be denied the benefit of the statute of limitations. While the intent of the tolling statute may not have been to impose such unconstitutional requirements, the practical effect of the statute does just that. *International Textbook Co.* v. *Pigg*, 217 U.S. at 110-111. Such a result is totally incompatible with the Commerce Clause. Since Searle is engaged totally in interstate and not intrastate commerce in New Jersey, this Court should now hold that New Jersey cannot so condition Searle's effective defense of suits in New Jersey courts arising unavoidably from that interstate commerce.

This is especially true considering that New Jersey has already provided plaintiffs with an available alternative to the tolling statute in its long-arm rule, N.J.R. 4:4-4(c)(1), read in conjunction with N.J.R. 4:2-2. As mentioned above, a New Jersey action is commenced by the filing of the complaint, thereby tolling the statute of limitations. Thus, a New Jersey plaintiff can commence an action within the limitations period by filing his complaint and search for the out-of-state defendant later. Upon a *pro forma* showing that the out-of-state corporation cannot be served in New Jersey, he may then have the summons and complaint mailed under the long-arm rule. Such an alternative provides ease of service for the plaintiff and at the same time protects defendants from stale claims. It accordingly imposes no burden on interstate commerce.

In sum, measured by any standard, this Court should hold that the tolling statute places on Searle's conduct of its in-

terstate business a burden which is unlawful under the Commerce Clause.

The New Jersey Supreme Court's unequal treatment of foreign corporations subject to long-arm jurisdiction and the Third Circuit's adoption of that treatment has resulted in unequal results throughout the Third Circuit.

Within the Third Circuit, Delaware and Pennsylvania have statutes which toll the statute of limitations for non-resident defendants. However, the highest courts of both Delaware and Pennsylvania have ruled that where the defendant, although a non-resident, is amenable to service and thus subject to the state's jurisdiction, the tolling statute is inapplicable. *See e.g., Hurwitch* v. *Adams,* 52 Del. 13, 151 A.2d 286 (Super. Ct. Del.), *aff'd,* 52 Del. 247, 155 A.2d 591 (Del. 1959); *Will* v. *Malosky,* 432 Pa. 246, 247 A.2d 788 (1968). Yet, the Third Circuit has denied to Searle the same privileges afforded to others in the Circuit.

The Third Circuit's reversal of the District Court's decision in *Cohn* was in error. It has cogently been observed:

> "Under the current statutory framework, a plaintiff maintaining an action against a nonresident has the option to proceed or postpone; the defendant is conclusively denied the right to interpose the defense of the statute of limitations. Through the plaintiff's utilization of long-arm procedures, in addition to deriving the benefit of the suspension of the limitation period, the nonresident defendant may be continually subject to the jurisdiction of the New Jersey courts while remaining totally unaware that an injured party is contemplating suit. The operation of the tolling provision poses a severe hardship to nonresidents in preparing an adequate defense, creates an irrational classification in regard to nonresident de-

fendants amenable to service of process, and flaunts the purpose and intent of the statute of limitations." Comment, "The Tolling Provision of the Statute of Limitations—A Haven for the Dilatory Plaintiff", 10 Seton Hall L. Rev. 585, 586 (1980).

It is respectfully submitted that the judgment of the Third Circuit is constitutionally infirm.

CONCLUSION

For the foregoing reasons, it is respectfully urged that this Court issue a writ of certiorari to review the judgment and opinion of the Third Circuit.

Respectfully submitted,

By: Raymond M. Tierney, Jr.
Shanley & Fisher,
Attorneys for Petitioner,
550 Broad Street,
Newark, New Jersey 07102.
(201) 643-1220

Dated: October 20, 1980

APPENDIX A

Opinion of the United States Court of Appeals for the Third Circuit

(Filed: July 23, 1980)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 79-1881

ROY HOPKINS,

Appellee,

v.

KELSEY-HAYES, INC.,

Appellant.

Nos. 79-2406 and 79-2605

SUSAN COHN and WALTER COHN, her husband,

Appellants in No. 79-2406,
Cross-Appellee in No. 79-2405,

v.

G. D. SEARLE & COMPANY,

Appellee in No. 79-2406,
Cross-Appellant in No. 79-2405.

Appendix A

APPEALS FROM THE UNITED STATES DISTRICT COURT
FJR THE DISTRICT OF NEW JERSEY

D.C. Civil Nos. 78-1646 and 74-0450)

Argued: February 11, 1980.

Before: ADAMS, GARTH and VAN DUSEN, Circuit Judges.

APELL, HOWARD AND MATHEWS
J. LLEWELLYN MATHEWS (Argued)
P.O. Box 95
Browns Mills, N.J. 08015

Attorneys for Appellee (79-1881)

SHANLEY & FISHER
RAYMOND M. TIERNEY, JR., (Argued)
ABBOTT S BROWN
550 Broad Street
Newark, N.J. 07102

Attorneys for Appellee,
Cross-Appellant (79-2406 and 2605)

RAWLE & HENDERSON
LOWELL A. REED, JR. (Argued)
2100 Packard Building
Philadelphia, PA 19102

Attorneys for Appellant (79-1881)

Appendix A

WALTER R. COHN, (Argued)
ELAINE HARRIS
15 Valley Street
South Orange, N.J. 07079

Attorneys for Appellants
(79-2406 and 2605)

OPINION OF THE COURT

GARTH, *Circuit Judge.*

These appeals[1] present up with constitutional challenges to a New Jersey statute, N.J.S.A. §2A:14-22, which tolls the statute of limitations in actions against foreign corporations which are not represented in New Jersey, but which may nonetheless be amenable to New Jersey's long-arm jurisdiction. By contrast, foreign corporations which are represented in New Jersey receive the full benefit of all limitations statutes. Thus, the defendants here, both non-represented foreign corporations, claim that N.J.S.A. §2A:14-22, by refusing them the protection of the limitation statute, has denied them due process and equal protection of the laws under the United States constitution.

We do not agree, as we conclude that the New Jersey statute is not irrational. Thus, we will not disturb New Jersey's legislative enactment, which we hold satisfies constitutional standards.

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[1] Although these cases were tried separately before two different district court judges, because they involve identical challenges to the constitutionality of a New Jersey statute, N.J.S.A. §2A:14-22, we consolidated them for the purpose of oral argument and disposition.

Appendix A

I.

A.

In the first of these appeals, *Cohn* v. *D. D. Searle & Co.*, the plaintiffs, who are husband and wife, sued G. D. Searle & Co. (herinafter "Searle") in tort for damages caused by a birth control pill, Enovid, which had been manufactured by Searle and which allegedly contributed to a stroke suffered by Mrs. Cohn. Searle is a Delaware corporation with its principal place of business in Illinois. Although it was at all times subject to New Jersey's long-arm jurisdiction, *see* N.J. Ct. R. 4:4-4(c)(1),[2] Searle was not registered to do business in New Jersey, and it maintained no agent for service of process in New Jersey. In fact, the only personnel affiliated with Searle who were located in New Jersey, during the time period relevant to this litigation, were 40 so-called "detail-persons" who worked out of their own homes and whose sole function was to generate good-will for Searle among New Jersey doctors.

Before trial, Searle claimed the benefit of New Jersey's two year statute of limitations as a defense. N.J.S.A. §2A:

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[2] Rule 4:4-4(c)(1) permits long-arm service upon out-of-state corporations in the following circumstance:

> If it appears by affidavit of plaintiff's attorney or of any person having knowledge of the facts that after diligent inquiry and effort personal service cannot be made upon any of the foregoing [methods for service within the state] and if the corporation is a foreign corporation, then, consistent with due process of law, service may be made by mailing, by registered or certified mail, return receipt requested, a copy of the summons and complaint to a registered agent for service, or to its principal place of business, or to its registered office.

14-2[3] In response, the plaintiff claimed that the statute of limitations was no bar to their complaint because N.J.S.A. §2A:14-22 (hereinafter the "tolling provision") tolls the limitations statute in any action against a foreign corporation which "is not represented in this state by any person or officer upon whom summons or other original process may be served. . . ."[4]

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[3] N.J.S.A. §2A:14-2 provides:

> Every action at law for an injury to the person caused by the wrongful act, neglect or default of any person within this state shall be commenced within 2 years next after the cause of any such action shall have accrued.

[4] N.J.S.A. §2A:14-22 provides in relevant part:

> If any person against whom there is any of the causes of action specified . . . is not a resident of this state when such cause of action accrues, or removes from this state after the accrual thereof and before the expiration of the times limited in said sections, *or if any corporation or corporate surety not organized under the laws of this state, against whom there is such a cause of action, is not represented in this state by any person or officer upon whom summons or other original process may be served,* when such cause of action accrues or at any time before the expiration of the times so limited, *the time or times during which* such person or surety is not residing within this state or *such corporation or corporate surety is not so represented within this state shall not be computed as part of the periods of time within which such an action is required to be commenced by the section.* The person entitled to any such action may commence the same after the accrual of the cause therefor, within the period of time limited therefor by said section, exclusive of such time or

(Footnote continued on following page)

With the issue thus framed, and conceding that no facts were in dispute, Searle then moved for summary judgment, asserting that the Cohns' claim was barred by the statute of limitations. Searle argued that the tolling provision was not applicable in this case because Searle was "represented" in New Jersey by its detail-persons. Alternatively, Searle contended that the tolling provision, if applicable to it, could not pass muster under the equal protection clause of the United States constitution in that it drew an arbitrary and irrational distinction between foreign corporations represented in New Jersey and foreign corporations not so represented, but which were nevertheless subject to New Jersey's long-arm jurisdiction.

The district court rejected Searle's argument that the presence of detail-persons in New Jersey afforded Searle the benefit of the statute of limitations. On the other hand, the district court accepted Searle's contention that the tolling provision was unconstitutional. 447 F. Supp. 903 (D. N.J. 1978). Reasoning that the tolling provision must be interpreted in light of the legislative intent at the *time of*

(Footnote continued from preceding page)

times of nonresidence or nonrepresentation. (emphasis added).

Plaintiffs claimed, alternatively, that the statute of limitations was tolled by N.J.S.A. §2A:14-21 which stops the running of the limitations period against persons who are "insane" when their causes of action accrue. In an unpublished opinion, the district court found that on this record, plaintiff's condition did not constitute insanity within the meaning of N.J.S.A. §2A:14-21. Consequently, the district court rejected this alternative argument. In light of our conclusion, *see infra*, that N.J.S.A. §2A:14-22 tolled the running of the limitations statute in this case, we need not, and do not, reach the merits of this contention.

its enactment, the court held that Searle's detail-persons were not adequate corporate "representatives" within the meaning of the tolling provision inasmuch as, as the time that provision was most recently amended, in 1949,[5] juris-

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[5] As the New Jersey Supreme Court has noted, the roots of the tolling provision are traceable as far back as 1820. *See Lempke* v. *Bailey*, 41 N.J. 295, 196 A.2d 523 (1963). In its original form, and up until 1949, however, the tolling provision made no specific reference to corporations. *Id.* (citing Pennington, *Laws of New Jersey, 1703-1820* at 670 (1821). As of 1949, the tolling provision, which thus denied both represented and non-represented foreign corporations the benefits of New Jersey's statutes of limitations, read as follows:

> If any person against whom there is or may be a cause of action specified in sections 2:24-1, 2:24-2, 2:24-3, 2:24-5, 2:24-6, 2:4-16 or 2:24-17 of this title is not a resident of this state when such cause of action accrues, or removes from this state after the accrual thereof and before the expiration of the times limited in said sections, the time or times during which such person is not residing within this state shall not be computed as a part of the periods of time within which such actions are required to be commenced by said sections; and the person entitled to any such action may commence the same after the accrual of the cause thereof, within the periods of time limited therefor by said sections, exclusive of such time or times of non-residence.

N.J.R.S. §2:24-7.

In 1949, the tolling provision was amended to its present form, referring, for the first time, to corporations "*represented in this state* by any person or officer upon whom summons or other original process may be served." Act of May 18, 1949, 1949 N.J. Laws, ch. 125 (amending N.J.R.S. §2:24-7) (1937)) (currently codified at N.J.S.A. §2A:14-22) (emphasis added). The legis-

(Footnote continued on following page)

diction could be obtained over a foreign corporation only by serving, within New Jersey, an "officer, director, trustee or a managing or general agent of the corporation."[6] *In*

(Footnote continued from preceding page)

lative statement accompanying the 1949 amendments to the tolling provision explained this provision as follows:

> Foreign corporations licensed to do business in New Jersey are now deprived by judicial construction of the benefit of the statute of limitations. The purpose of this bill is to correct that situation. New York State found it necessary to make a similar change in its law in view of recent court decisions.
>
> The New York tolling law which is referred to in the legislative statement was N.Y.C.P.A. §19, which had been amended in 1943 so as to include as beneficiaries of the New York statutes of limitations, foreign corporations with "one or more officers or other persons in the state on whom a summons for such corporation may be served." Act of April 3, 1943, 1943 N.Y. Laws, ch. 263.

[6] In 1949, the New Jersey rules governing service of process on corporations were as follows:

> *N.J.R.S. §2:26-43. Domestic corporations in personal action, personal or substituted service summons.*
>
> Service of a summons in a civil action commenced against a domestic corporation in any of the courts of this State may be made by delivering a copy hereof to an officer, director, trustee or a managing or general agent of the corporation personally, or by leaving a copy thereof at his dwelling house or usual place of abode with some competent member of his family of the age of fourteen years or over then residing therein, or by delivering a copy thereof

(Footnote continued on following page)

personam jurisdiction over Searle, therefore, could not have been obtained by service on mere detail-persons. 447 F. Supp. at 909-10.

Having disposed of this statutory issue, the district court then turned to Searle's constitutional claims. The court observed that the purpose of the tolling provision, when it was originally enacted and as it was subsequently amended, *see* note 5 *supra*, was to protect New Jersey plaintiffs asserting causes of action against corporate defendants which were not subject to *in personam* jurisdiction in the New Jersey courts. In light of this purpose, the court concluded that the tolling provision was no longer relevant in cases where the out-of-state defendant was now subject to the long-arm jurisdiction of the New Jersey courts—a jurisdictional expansion which, in

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(Footnote continued from preceding page)

to any person authorized by appointment or by law to receive service of process on behalf of the corporation, or by leaving a copy thereof at the registered office of the corporation with any person in charge thereof.

N.J.R.S. §*2:26-44. Foreign corporations.*

Service of a summons in a civil action commenced against a foreign corporation may be made in the same manner as is provided in section 2:26-43 of the Revised statutes for service of summons upon a domestic corporation.

New Jersey's rule for long arm service was not promulgated until 1958, N.J. Ct. R.R. 4:4-4(d) (effective September 3, 1958) (presently N.J. Ct. R. 4:4-4(c)). *See* note 2 *supra*. It was not until 1971, however, that the New Jersey Supreme Court construed the long-arm rule to permit out-of-state service "to the uttermost limits permitted by the United States Constitution." *Avdel Corp.* v. *Mecure*, 58 N.J. 264, 277 A.2d 207 (1971).

New Jersy,[7] post-dated the 1949 amendment to the tolling provision. Therefore, the district court held that the continued application of the tolling provision in cases such as this one served no rational purpose and consequently violated the United States constitution. *See* 447 F. Supp. at 910-12.

Both parties appealed from the judgment of the district court. In No. 79-2605, Searle contends that the district court erred by concluding that the presence of its detail-persons in New Jersey did not entitle it to the benefit of the statute of limitations. In No. 79-2406, the Cohns argue, contrary to the district court's holding, that the tolling provision is a rational exercise of the legislature's prerogative and thus is constitutional.

B.

In the second appeal before us, *Hopkins* v. *Kelsey-Hayes, Inc.*, the plaintiff, Hopkins, was injured on May 18, 1975 when a tire mounted on a rim which had been manufactured by Kelsey-Hayes exploded. This lawsuit was filed on April 27, 1978, nearly three years after plaintiff's cause of action had accrued. Kelsey-Hayes is a Delaware corporation, which has never been represented in New Jersey. However, at all times it has been subject to New Jersey's long-arm jurisdiction.

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[7] The United States Supreme Court sanctioned broad long-arm rules in *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), when it held that states could exercise *in personam* jurisdiction over out-of-state defendants with only "certain minimum contacts" with the forum state. Expansive long-arm jurisdiction in New Jersey was not recognized until much later, however. *See* note 6 *supra.*

Appendix A

Before a different district court judge than the judge who presided in *Cohn* v. *G. D. Searle, Inc.*, Kelsey-Hayes claimed the benefit of New Jersey's two year statute of limitations and moved for summary judgment. Plaintiff responded that the running of the limitations statute was tolled by N.J.S.A. §2A:14-22, *see* note 4 *supra*, and that therefore its complaint was not barred. Alternatively, the plaintiff argued that the statute was tolled under New Jersey's "discovery rule," *see Lopez* v. *Swyer*, 62 N.J. 267, 300 A.2d 563 (1973), *Fernandi* v. *Strully*, 35 N.J. 434, 173 A.2d 277 (1961), under which the statute does not begin to run until the plaintiff has had a reasonable opportunity to "discover" the identity of the person who caused his injury. At the pre-trial stage, Kelsey-Hayes responded only to the plaintiff's first argument. It claimed that the tolling provision, when applied to defendants subject to New Jersey's long-arm jurisdiction, violated the due process and equal protection clauses of the United States constitution.

In ruling on Kelsey-Hayes' summary judgment motion, the district court similarly confined its analysis to the constitutionality of the tolling provision. The district court judge in *Hopkins* expressly disagreed with the constitutional holding reached by the district court judge in *Cohn* v. *G. D. Searle, Inc., supra*. The *Hopkins* court concluded that since under New Jersey law, obtaining jurisdiction over non-represented foreign corporations process under the long-arm rule was more difficult than obtaining jurisdiction over foreign corporations which were represented in New Jersey, a rational basis existed for distinguishing between these two categories of defendants. Having found that this "rational basis" supported the tolling provision, the district court rejected both defendant's due process and

equal protection arguments. *Hopkins* v. *Kelsey-Hayes, Inc.*, 463 F. Supp. 539, 542 (D.N.J. 1978).

Pursuant to 28 U.S.C. § 1292(b), the district court and this court certified Kelsey-Hayes' interlocutory appeal from the order denying summary judgment.

C.

Shortly before we heard argument in these cases, counsel called our attention to *Velmohos* v. *Maren Engineering Corp.*, No. A-72/143 (N.J. Sup. Ct. June 18, 1980), a case which was at that time pending before the New Jersey Supreme Court. *Velmohos* involves the identical issues raised in these appeals.

In *Velmohos*, as in these cases, New Jersey plaintiffs had sued non-represented foreign corporations in tort, and had relied upon the tolling provision in response to a statute of limitations defense. The state defendants in *Velmohos* raised two arguments against application of the tolling provision. First, they claimed that their amenability to New Jersey's long-arm jurisdiction constituted sufficient "representation" within the state to entitle them to a limitations defense—in that case, two years. Secondly, they argued that, as applied to them, the tolling provision violated the federal constitution. In an unreported opinion, the state trial court in *Velmohos* struck down the tolling provision on federal constitutional grounds, adopting the reasoning of the district court in *Cohn* v. *G. D. Searle & Co.*, *supra*. This decision was reversed by the Appellate Division of the Superior Court, which held that the tolling provision was rational and was thus constitutional. 168 N.J. Super. 520 (App. Div. 1979).

Appendix A

Notwithstanding the pendency of the *Velmohos* appeal before the New Jersey Supreme Court, we heard arguments on the merits in the appeals before us. Nevertheless, recognizing that certain holdings of the New Jersey Supreme Court would have binding effect upon us,[8] and at the suggestion of all the parties, we agreed to withhold decision in these cases pending the decision in *Velmohos*.

On June 18, 1980 the New Jersey Supreme Court filed its opinion in *Velmohos*, affirming the Appellate Division. *Velmohos* v. *Maren Engineering Corp.*, No. A-72/143 (N.J. Sup. Ct. June 18, 1980). The court, in construing the New Jersey statute which provides for tolling, held that a foreign corporation's mere amenability to New Jersey's long-arm jurisdiction did not constitute sufficient "representation" of that corporation in New Jersey to prevent the tolling of the statute of limitations. *Id.*, slip op. at 17. In so holding, the New Jersey Supreme Court reasoned that the "language [of the tolling provision] must be interpreted from the intent of the Legislature at the time of enactment." *Id.*, slip op. at 15. At the time the tolling provision was enacted, the concept of "representation" within New Jersey, as that term is used in the tolling provision, could not have included amenability to long-arm jurisdiction, because long-arm jurisdiction did not then exist. *See* notes 6 and 7 *supra*. Thus, the court reasoned that incorporating the judicial expansion of long-arm jurisdiction into its interpretation of

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[8] Any construction of the New Jersey tolling provision by the state's highest court would, of course, be binding upon us. Similarly, we would be bound if the New Jersey Supreme Court *struck down* the provision on *state* constitutional grounds. However, any decision of the New Jersey Supreme Court on *federal* constitutional grounds is not binding upon us.

the tolling provision would be accepting the argument that "a Rule of Court can act as an implied, partial repeal of a legislative enactment." This the Supreme Court of New Jersey refused to do, *Velmohos, supra,* slip op. at 16.

Having thus disposed of the defendants' statutory arguments,[9] the *Velmohos* court then proceeded to consider and, after consideration, to reject the constitutional challenges to the tolling provision. The court concluded that the existence of long-arm jurisdiction did not destroy the rationality of the tolling provision, observing that extraterritorial service is far more difficult to achieve than service within the state. *Id.,* slip op. at 23.[10]

Since *Velmohos* has been decided and we have received comments from the parties, we now turn to the issues presented to this court. We conclude that the defendants in both cases are subject to the New Jersey tolling provision and that the tolling provision does not violate the fourteenth amendment of the United States constitution.

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[9] Two justices dissented from the majority opinion in *Velmohos.* They would have construed the tolling provision as inapplicable to corporations which are amenable to long-arm jurisdiction. Consequently, they did not reach the constitutional questions. *See Velmohos* v. *Marne Engineering Corp., supra* (Sullivan, J. dissenting, joined by Handler. J.)

[10] The New Jersey Supreme Court observed that, had the statute been attacked under the New Jersey state constitution, its analysis and result would have been no different. *Velmohos, supra,* slip op. at 18-19 n.12.

Appendix A

II.

A.

The first step in our analysis of the merits of these appeals has been facilitated, to a great extent, by the opinion of the New Jersey Supreme Court in *Velmohos*. For after *Velmohos*, a corporation whose only "presence" in New Jersey is that it is amenable to the state's long-arm jurisdiction, clearly cannot argue that under the tolling statute it is "represented" in New Jersey so as to obtain the benefit of New Jersey's limitations statute.[11] In *Kelsey-Hayes*, this holding settles the statutory issue, enabling us to proceed directly to the constitutional question, because *Kelsey-Hayes*, the corporate defendant in that case, had no other "presence" in New Jersey apart from its amenability to long-arm jurisdiction.

In *Searle*, however, the statutory issue has not been completely resolved by *Velmohos* in light of the presence of Searle's detail-persons in New Jersey. The district court in *Searle* ruled that the existence of these detail-persons did not preclude the operation of the tolling statute, and Searle's appeal from that ruling is the subject of No. 79-2605. Although it has not expressly decided the issue before us, we are convinced from the *Velmohos* opinion, that the New Jersey Supreme Court would simi-

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[11] Many other state courts have construed their tolling provisions differently, so that out-of-state defendants amenable to long-arm jurisdiction would be exempt from the tolling rule. *See generally* Annot., *Tolling of Statute of Limitations During Absence from State as Affected by Fact that Party Claiming Benefit of Limitations Remained Subject to Service During Absence or Nonresidence*, 55 A.L.R.3d 1158. As the *Velmohos* majority points out, however, those cases involved different statutory language than the New Jersey tolling provision. *See Velmohos, supra* slip op. 14 & 14n.8

larly conclude that Searle's detail-persons are not the "representatives" contemplated within the tolling provision.

As previously indicated, in *Velmohos,* the New Jersey Supreme Court emphasized that the language of the tolling provision "must be interpreted from the intent of the Legislature in light of the circumstances at the time of enactment." *Velmohos, supra,* slip op. at 15. At the time the tolling provision was amended to refer to corporations which were "represented" in New Jersey, *see* note 5 *supra,* personal service upon minor functionaries such as Searle's detail-persons would not have sufficed to obtain jurisdiction over foreign corporations. *In personam* jurisdiction over foreign corporations could only have been obtained by service upon officers or duly appointed agents of the company. *See* N.J.S.A. §2:26-44 (repealed) (quoted in note 6 *supra*); *Porcelli* v. *Great Atlantic & Pacific Tea Co.,* 128 N.J.L. 603, 27 A.2d 641 (Sup. Ct. 1941); *cf.* N.J. Ct. R. 4:4-4(c)(1); *Wright* v. *News Syndicate Co.,* 35 N.J.Super. 133, 113 A.2d 215 (1955) (service on "any servant of the corporation" within New Jersey appropriate under current rules). Thus, the New Jersey legislature could not have intended that individuals such as Searle's detail-persons could obtain the benefits of the limitations statutes for their companies, particularly since the detail-persons had only a minimal affiliation with Searle and could not, at the time tolling provision was enacted, have subjected Searle to *in personam* jurisdiction in New Jersey.

Moreover, it is significant, as the New Jersey Supreme Court noted, *see Velmohos, supra,* slip op. at 15, that the tolling provision speaks of individuals who "represent,"

rather than just "act" for, the foreign corporation in New Jersey. By contrast, the applicable court rules of service speak only of "servants" who merely "act" in New Jersey. *See* N.J. Ct.R. 4:4-4(c)(1). It appears to us, therefore, that the statutory tolling provision contemplates a much more significant corporate figure or presence—one capable of "representing" the corporation—than does the service rule. This higher standard which requires "representation" in New Jersey before a foreign corporation can receive the benefits of the limitations statutes, comports with the original purpose of the tolling rule: to permit plaintiffs who have causes of action against foreign corporate defendants which are not represented in New Jersey, to maintain the viability of their actions despite the passage of time. Moreover, this purpose is consistent and compatable with New Jersey's policy of liberally construing limitations statutes so as to preserve, whenever possible, a plaintiff's opportunity to litigate his claim on the merits. *See Velmohos, supra, Galligan* v. *Westfield Centre Service, Inc.,* 82 N.J. 188, 412 A.2d 122 (1980).

Therefore, in light of its own statutory analysis, we are satisfied that the New Jersey Supreme Court, if faced with this question, would hold that Searle's detail-persons do not constitute "representation" of Searle in New Jersey, sufficient to provide New Jersey's limitations protections to Searle. To the contrary, we are convinced that the New Jersey Supreme Court would hold, and consequently we hold, that Searle's detail-persons do not exempt it from the tolling provision. Accordingly, unless the tolling provision is unconstitutional, and we conclude that it is not, the limitations statute will not bar the plaintiffs' claims against the defendants in both cases before us.

Appendix A

B.

Thus, there remains for consideration only the constitutional challenges made here to the tolling provision. The defendants concede that the tolling provision does not implicate any fundamental interest or suspect classification.[12] In these circumstances, we ordinarily afford great leeway to legislative judgments. As we recently stated:

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[12] Indeed, this concession would seem to be compelled by *Campbell* v. *Holt*, 115 U.S. 620 (1885) where the Supreme Court held that repeal of a statute of limitations as to debts which had already been barred did not implicate the fourteenth amendment rights of the debtor. In reaffirming *Campbell*, some 60 years later, the Court, speaking through Justice Jackson, stated:

> Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. Order of Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342, 349. They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation.[13] They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a "fundamental" right or what used to be called a "natural" right of the individual. He may of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large decree of legislative control.

Chase Securities Corp. v. *Donaldson*, 325 U.S. 304, 314 (1945) (footnote omitted). Thus, it is clear that the defendants have no "right" to protection of the statute of limitations. Their only claim can be that the state legislature acted irrationally, under the circumstances, by denying them the benefit of the limitations statute.

Appendix A

> In reviewing a state statute or constitutional provision under the due process or equal protection clause, a court must determine if the provision rationally furthers *any* legitimate state objective. "For these purposes, it is, of course, constitutionally irrelevant whether this reasoning in fact underlay the legislative decision. . . ." *Flemming* v. *Nestor*, 363 U.S. 603, 612 (1960). The court may even hypothesize the motivations of the state legislature to find a legitimate objective promoted by the provision under attack. *See Weinberger* v. *Salfi*, 422 U.S. 749, 780 (1975); *Williamson* v. *Lee Optical Inc.*, 348 U.S. 483, 487-90 (1955); *Trafelet* v. *Thompson*, 594 F. 2d 623, 626 (7th Cir.), *cert. denied*, —— U.S. ——, 48 U.S.L.W. 3239 (Oct. 1, 1979).

Malmed v. *Thornburgh*, No. 79-2467, slip op. at 7, (3d Cir. May 13, 1980) (Aldisert, J.) (emphasis in original). Thus, the defendants challenging the constitutionality of the tolling provision have the difficult burden of demonstrating that the provision cannot "rationally further[ ] *any* legitimate state objective." *Id.*

In seeking to meet this burden, the defendants argue that the tolling provision violates the constitution because it is overprotective.[13] They argue that the purpose

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[13] When no fundamental interests or suspect classifications are involved, both "underinclusive" and "overinclusive" statutes are subjected to the same "minimum rationality" test. Nevertheless, it has been argued that "overinclusive" or overprotective statutes present even less need for judicial action than statutes which are "underinclusive" in their regulatory sweep.

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of the tolling provision was to protect New Jersey plaintiffs who could not obtain *in personam* jurisdiction over out-of-state defendants.[14] The defendants contend that the tolling provision is no longer relevant or needed to promote this interest in cases where an out-of-state corporate defendant is amenable to New Jersey's long-arm jurisdiction. In such cases, they contend the plaintiffs may assert their causes of action and serve their complaints upon non-represented foreign corporate defendants in the same fashion as they serve domestic corpora-

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(Footnote continued from preceding page)

> "Overinclusiveness," a second variant of legislative approximation for which a classification may be overturned,[16] poses less danger than underinclusiveness, at least from the viewpoint of political accountability, for overinclusiveness does not exempt potentially powerful opponents from a law's reach.

L. Tribe, American Constitutional Law, 999 (1978). (Footnote omitted).

[14] In a technical sense, this appears to be an over-simplification. In 1949, the tolling provision was amended to exempt foreign corporations "represented in this state by any person or officer upon whom summons . . . may be served. . . ." Four years earlier, however, the Supreme Court had greatly expanded the states' jurisdictional powers over out-of-state defendants, permitting the state courts to exercise *in personam* jurisdiction over out-of-state defendants with "certain minimum contacts" with the forum state. *International Shoe Co.* v. *Washington,* 326 U.S. 310 (1945). Thus, at the time the tolling provision was last amended, New Jersey plaintiffs could have constitutionally obtained service on foreign corporations who did not have "representatives" in the state. The New Jersey courts did not recognize the full expanse of long-arm jurisdiction until much later, however. *See Avdel Corp.* v. *Mecure,* 58 N.J. 264, 277 A.2d 207 (1971); notes 6 and 7 *supra.*

tions or foreign corporations "represented" in New Jersey. Thus, they claim that the extra protection provided New Jersey plaintiffs by the tolling provision, is unnecessary and arbitrary in light of the original purpose of the tolling provision. Being arbitrary, they contend the statute is therefore unconstitutional.

The defendant's argument overlooks the fact that the tolling provision must be upheld if it "rationally furthers *any* legitimate state objective," without regard to whether the legislature specifically focused on that objective. *Malmed* v. *Thornburgh, supra.* In this case, at least one such legitimate objective is readily apparent: the tolling provision eases the burdens upon New Jersey plaintiffs prosecuting lawsuits against out-of-state defendant corporations which are not represented in New Jersey and which, in a great many instances, are difficult to locate and to serve, despite the availability of the long-arm rule. The New Jersey Court Rules, by their very terms, make clear that long-arm service may be utilized only as a last resort. They provide that service may be made

> [u]pon a domestic or foreign corporation, by serving . . . either an officer, director, trustee, or managing or general agent; or any person authorized by appointment or by law to receive service of process on behalf of the corporation; or the person at the registered office of the corporation in charge thereof. If service cannot be made upon any of the foregoing, then it may be made upon the person at the place of business of the corporation in this State in charge thereof, or if there is no place of business in this State, then upon any servant of the corporation within this State acting in the discharge of his duties. *If it appears by affidavit of plaintiff's at-*

> *torney or of any person having knowledge of the facts that after diligent inquiry and effort personal service cannot be made upon any of the foregoing* and if the corporation is a foreign corporation, then, consistent with due process of law, service may be made by mailing, by registered or certified mail, return receipt requested, a copy of the summons and complaint to a registered agent for service, or to its principal place of business, or to its registered office.

N.J. Ct.R. 4:4-4(c)(1) (emphasis added).

Moreover, Justice Pashman in writing for the New Jersey Supreme Court in *Velmohos* emphasized the special burdens which inhere in achieving long-arm service:

> Under our rules, extra-territorial service is not simply an alternative to service within the State. Plaintiffs may not resort to out-of-state service unless proper efforts to effect service in New Jersey have failed. The rule imposes a further burden on a plaintiff by requiring him to gather sufficient information to satisfy a court that service is "consistent with due process of law."

Velmohos, supra, slip op. at 23.

Since long-arm service is more difficult to achieve than service within the state, it is not irrational for New Jersey to distinguish between two classes of foreign corporations. Those foreign corporations which are represented in New Jersey, and are thus more readily available to plaintiffs, are afforded limitations protections. On the other hand, the limitations statutes are tolled against foreign corpora-

tions which are not represented in New Jersey and thus are not as available to New Jersey plaintiffs. This distinction betwen represented and non-represented foreign corporations reflects the pragmatic difficulties which may be encountered by plaintiffs suing foreign corporations. Since service of process under the long-arm statute is more difficult and time-consuming to achieve than service within the state, and since out-of-state, non-represented corporate defendants may be difficult to locate let alone serve, tolling the statute of limitations protects New Jersey plaintiffs and facilitates their lawsuits against such defendants. Because the tolling provision fulfills the legitimate state purpose of easing the special burdens of suits against non-represented foreign corporations, we cannot say that the distinction which it recognizes is irrational.[15]

In arguing against the constitutionality of the tolling provision, the defendants attempt to distinguish between the service of a complaint and the filing of a complaint. They point out that, under New Jersey practice, a plaintiff can

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[15] Although many courts have construed state tolling statutes so as to exempt individuals who are subject to service of process in the state, *see* note 10 *supra*, no court, other than the district court in *Cohn* v. *Searle*, *supra*, has concluded that such a result was mandated by the constitution. In fact, in *Vaughn* v. *Deitz*, 430 S.W.2d 487 (Sup. Ct. Tex. 1968), the Texas Supreme Court specifically upheld the Texas tolling statute against a constitutional argument identical to that raised here.

Moreover, in *Bauserman* v. *Blunt*, 147 U.S. 647 (1893), the Supreme Court gave effect to a Kansas statute which tolled the statute of limitations in an action against an out-of-state defendant who was nevertheless subject to service in the state. Although *Bauserman* did not discuss the constitutional issue, the court implicitly recognized the constitutionality of this type of tolling provision.

file a "John Doe" complaint, and thereby stop the running of the statute of limitations without having served the defendant with process. *See* N.J. Ct.R. 4:4-1 (summons must be served within 10 days of filing a complaint or action may be dismissed on defendant's motion). This procedure, they argue, enables a plaintiff to preserve his complaint against a statute of limitations defense, notwithstanding any later difficulties encountered in serving process. Because of this procedure, the defendants contend that the protection afforded by the tolling provision is superfluous and that the tolling provision is thus arbitrary, irrational and, consequently, unconstitutional.

We are not persuaded by the defendants' argument. In the first instance, the protection afforded plaintiff by the "John Doe" procedure is imperfect, at best. Complaints filed in this manner are subject to dismissal after six months on the court's own motion, unless the plaintiff, by proving his diligence, can convince the court to retain the case on the docket. N.J.Ct.R. 1:13-7. We do not believe that, given their crowded calendars, the state courts would permit a "John Doe" complaint to remain on the docket for a lengthy or indefinite period of time. Thus, the "John Doe" procedure does not, in fact, afford New Jersey plaintiffs the same protection as the tolling provision. Furthermore, the defendants' argument suffers from a more basic flaw. Even if the tolling provision could be considered superfluous in light of the "John Doe" procedure, this would not necessarily lead to our holding that the tolling provision is arbitrary or irrational. Nothing in law or logic prevents the New Jersey legislature from providing New Jersey plaintiffs with a mechanism for relief from the burdens of suits against non-represented foreign corporations which is additional to any mechanism found in the Court Rules.

Accordingly, since we find that N.J.S.A. §2A:14-22 has a rational foundation, and recognizing that rationality is the test for both due process and equal protection challenges in this context, *see Malmed* v. *Thornburgh, supra,* we reject the defendants' constitutional attacks on the statute.

III.

We therefore hold that the foreign corporate defendants in these cases, not being represented in New Jersey, are subject under New Jersey law to New Jersey's tolling provision, which we hold to be constitutional. Thus, in these cases, defendants may not claim the protection of the statute of limitations. In light of our conclusion, the interlocutory order of the district court which denied summary judgment in *Hopkins* v. *Kelsey-Hayes,* at No. 79-1881, will be affirmed, and the order of the district court in *Cohn* v. *G. D. Searle,* at Nos. 79-2406 and 79-2605, entering judgment for the defendant will be reversed. Each case will be remanded to the particular district court for further proceedings. Costs in each case will be taxed against the respective defendant.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX B

Judgment of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 79-1881

ROY HOPKINS

vs.

KELSEY-HAYES, INC.,

Appellant

(D. C. Civil No. 78-1646)

Nos. 79-2406 and 79-2605

SUSAN COHN and WALTER R. COHN, her husband,

Appellants in No. 79-2406

vs.

G. D. SEARLE & COMPANY,

Appellant in No. 79-2605

(D. C. Civil No. 74-0450)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Appendix B

PRESENT: ADAMS, VAN DUSEN AND GARTH, *Circuit Judges*

JUDGMENT

These causes came on to be heard on the records from the United States District Court for the District of New Jersey and were argued by counsel on February 11, 1980.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed April 27, 1979 and appealed at our No. 79-1881, be, and the same is hereby affirmed, and the judgment of the said District Court filed August 6, 1979 and appealed at our Nos. 79-2406 and 79-2605, be, and the same is hereby reversed, and the causes are remanded to the particular District Court for further proceedings consistent with the opinion of this Court. Costs in each case are taxed against the respective defendant.

ATTEST:

THOMAS QUINN
Clerk

July 23, 1980

APPENDIX C

Opinion of the United States District Court for the District of New Jersey Re: Cohn v. G. D. Searle & Company

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

Civ. A. No. 74-450

March 22, 1978

SUSAN COHN and WALTER COHN, her husband,

Plaintiffs,

v.

G. D. SEARLE & COMPANY,

Defendant.

Walter R. Cohn, Newark, N. J., for plaintiffs.

Shanley & Fisher by Raymond M. Tierney, Jr., Robert L. Dughi, Newark, N. J., for defendant.

OPINION

MEANOR, District Judge.

This matter comes before the court on defendant's motion for summary judgment. For reasons stated hereinafter, the issues presented by this motion will be treated

in two stages. This first opinion is addressed to the question whether the defendant is entitled to the benefit of the statute of limitations. The resolution of the issue turns on the construction and application of the New Jersey tolling statute to a foreign unlicensed corporate defendant which, from the time of the occurrence of the injury alleged in the instant complaint, had no formal presence within New Jersey yet remained amenable to long-arm service.

If it is determined that the defendant has available to it the defense of the statute of limitations, then it will be necessary to decide whether the plaintiffs are entitled to the "discovery" exception to strict application of the statute.

Plaintiffs Susan and Walter Cohn have brought this suit against G. D. Searle & Co. (hereinafter "Searle"), the manufacturer of the oral contraceptive Enovid, for personal injury and per quod damages allegedly resulting from Mrs. Cohn's use of the drug. Mrs. Cohn commenced taking the contraceptive in the spring of 1963 and continued its use until December 22, 1964. On that date she suffered a stroke, or cerebral vascular accident (C.V.A.), when a blood clot lodged in the circulatory system of her brain. The C.V.A. required surgery, long hospitalziation and rehabilitative therapy and resulted in permanent physical injury.

From the sparse information before me at this time it appears that in 1964 little or nothing was known about potential coagulant side effects of oral contraceptives. However, from at least 1966 the medical literature and the lay press increasingly reported work which suggested a relationship between oral contraceptives and abnormal blood clotting. Sometimes between 1966 and late 1973 the Cohns became

aware of the possible linke between Mrs. Cohn's C.V.A. and ingestion of Enovid. They initiated suit against Searle on January 29, 1974. Their complaint, predicated on theories of negligence, breach of warranty, statutory violations and strict liability, was filed in the Superior Court of New Jersey, Law Division, Bergen County. Service was effected on Searle under the long-arm rule. On April 1, 1974 the case was removed to this court pursuant to 28 U.S.C. § 1441. Jurisdiction is vested under 28 U.S.C. § 1332.

At all times relevant to this action the plaintiffs have been residents of New Jersey. Searle is a Delaware corporation with its principal place of business in Illinois. Prior to December 30, 1960 Searle was registered to do business in New Jersey, but on that date it formally withdrew from the state. However, from 1964 to 1974, the period between Mrs. Cohn's C.V.A. and the filing of the instant complaint, Searle retained in its employ some four dozen persons known as Medical Service Representatives or "detailmen" who worked and, in most cases, resided in New Jersey. The function of these detailmen was to call on physicians to discuss Searle's pharmaceutical products.

Searle moves for summary judgment on grounds that plaintiffs' cause of action is time-barred undere the relevant two-year statute of limitations, N.J.S.A. 2A:14-2 (1952).[1] Searle acknowledges that plaintiffs may have some relief from the strict two-year limit under the New Jersey "discovery" rule. *Fernandi* v. *Strully*, 35 N.J. 434, 173 A.

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[1] N.J.S.A. 2A:14-2 provides:

> Every action at law for an injury to the person caused by the wrongful act, neglect or default of any person within this state shall be commenced within 2 years next after the cause of any such action shall have accrued.

2d 277 (1961); *Lopez* v. *Swyer*, 62 N.J. 267, 300 A.2d 563 (1973). Nevertheless, Searle asserts that the Cohns had reason to know of the cause of action against Searle no later than 1970, and, therefore, their claims are precluded.

[1] Plaintiffs respond that their action is timely because the causal relationship between contraceptives and clotting was not definitively demonstrated until late 1973, and that in any case the New Jersey tolling statute, N.J.S.A. 2A:14-22 (1952),[2] deprives Searle of the statute of limitations because Searle is a foreign corporation not represented within the state by "any person or officer" upon whom process

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[2] N.J.S.A. 2A:14-22 provides:

> If any person against whom there is any of the causes of action specified in sections 2A:14-1 to 2A:14-5 and 2A:14-8, or if any surety against whom there is a cause of action specified in any of the sections of article 2 of this chapter, is not a resident of this state when such cause of action accrues, or removes from this state after the accrual thereof and before the expiration of the times limited in said sections, or if any corporation or corporate surety not organized under the laws of this state, against whom there is such a cause of action, is not represented in this state by any person or officer upon whom summons or other original process may be served, when such cause of action accrues or at any time before the expiration of the times so limited, the time or times during which such person or surety is not residing within this state or such corporation or corporate surety is not so represented within this state shall not be computed as part of the periods of time within which such an action is required to be commenced by the section. The person entitled to any such action may commence the same after the accrual of the cause thereof, within the period of time limited thereof by said section, exclusive of such time or times of nonresidence or nonrepresentation.

could be served within the meaning of the tolling statute. Searle retorts that the tolling statute is inapplicable because Searle was effectively represented within the state by its detailmen, or alternatively, by virtue of the fact that from the date of the C.V.A. onward it was subject to New Jersey long-arm jurisdiction. Finally, if the tolling statute, as interpreted by the New Jersey courts, is deemed to apply to a foreign corporation amenable to long-arm service, Searle asserts that the statute as applied violates the equal protection and due process clauses of the United States Constitution. Thus, the questions presented by this motion are whether Searle is entitled to the benefit of the statute of limitations, and if so, whether the plaintiffs' action is timely upon application of the "discovery" rule even though the instant complaint was filed over nine years after the injury to Mrs. Cohn. I shall consider the statute of limitations issue here. Because I find Searle is entitled to a statute of limitations defense, I must reach the second question, but I leave it for another day.[3]

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[3] The parties are still negotiating over the terms of a submission, if necessary, on the discovery issue. In the New Jersey courts resolution of that issue would take place without a jury, *Lopez* v. *Swyer, supra,* but here jury trial exists as a matter of right. *Goodman* v. *Mead Johnson & Co.,* 534 F.2d 566 (3d Cir. 1976). I understand that the parties are willing to submit the discovery question to me on the existing written record without an evidentiary hearing and, of course, without jury trial. I am willing to accept it on that basis. However, I am informed that the defendant seeks to exact from the plaintiffs an agreement that any facts found as a result of such a submission of the issue be reviewed on appeal by the "clearly erroneous" standard of Rule 52(a), F.R.Civ.P., rather than to permit the Court of Appeals to review such fact determinations without the constraints of the clearly erroneous standard. *See Government of Virgin Islands* v. *Gereau,* 523 F.2d 140, 145-146 (3d Cir. 1975).

[2-5] At the heart of the issue of whether Searle has a statute of limitations defense is the construction and application of the tolling statute. N.J.S.A. 2A:14-22 provides in relevant part:

> If any person against whom there is any of the causes of action specified in section 2A:14-1-5 and 2A:14-8 . . . is not a resident of this state when such cause of action accrues, or removes from this state after the accrual thereof and before the expiration of the times limited in said sections, or *if any corporation . . . not organized under the laws of this state, against whom there is such a cause of action, is not represented in this state by any person or officer upon whom summons or other original process may be served, when such cause of action accrues or at any time before the expiration of the times so limited, the time or times during which* such person . . . is not residing within this state or *such corporation . . . is not so represented within this state shall not be computed as part of the periods of time within which such an action is required to be commenced by the section.* The person entitled to any such action may commence the same after the accrual of the cause therefor, within the period of time limited therefor by said section, exclusive of such time or times of nonresidence or nonrepresentation.

(Emphasis supplied.) The statute exempts from its effect foreign corporations represented in the state by "any person or officer" upon whom process may be served.

It is undisputed that Searle has had no statutory or appointed agent in New Jersey at any time from the date of

Mrs. Cohn's C.V.A. Nevertheless, Searle first argues that it is within the foreign corporation exception because it was represented by detailmen who are "persons or officers" within the meaning of the tolling statute. The rules pertaining to service on foreign corporations from the date of Mrs. Cohn's injuries are R.R. 4:4-4(d) (effective Sept. 3, 1958) and its successor R. 4:4-4(c)(1) (effective Sept. 8, 1969) (current version). Searle notes that under these rules jurisdiction may be obtained over a foreign corporation "by serving . . . any servant of the corporation within this State acting in the discharge of his duties." Searle argues that the tolling statute must be construed to be consistent with the service rules during the time period relevant to this action, and since personal jurisdiction could have been obtained over Searle by serving a detailman in the discharge of his duties, representation by detailmen during the period was sufficient to stay the tolling of the statute of limitations.

Searle's argument is not persuasive for two reasons. First, Searle's proposed construction of the foreign corporation exception to the tolling statute is inconsistent with the manifest purpose of the statute itself. That enactment was intended to protect plaintiffs in New Jersey courts[4] by preserving their causes of action where ser-

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[4] The courts of New Jersey have found that the tolling statute operates to the benefit of residents and nonresident plaintiffs whose causes of action have accrued within the state. *Govan* v. *Trade Bank & Trust Co.*, 109 N.J.Super. 271, 263 A.2d 146 (App.Div. 1970); *Marsh* v. *Davis*, 99 N.J.Super. 130, 238 A.2d 709 (Law Div. 1968). However, in a subsequent opinion which failed to mention *Govan* the Third Circuit has held that the tolling statute protects only New Jersey residents. *Zelson* v. *Thomforde*, 428 F.2d 1360 (3d Cir. 1970).

vice could not be had upon a defendant on account of absence from the state. *Lemke* v. *Bailey*, 41 N.J. 295, 303, 196 A.2d 523 (1963) (Schettino, J., dissenting); *Ferraro* v. *Ferro Trucking Co.*, 72 N.J.Super. 519, 524, 179 A.2d 74 (Law Div. 1962). Searle's detailmen operated out of their homes because Searle had no office within this state. They reported to Searle's office in Skokie, Illinois. Their function was to talk to New Jersey doctors about Searle's products to advertise them and generate good will for the company. Searle does not assert that they had any power to make contracts or place orders. Thus, the detailmen had minimal association with Searle in the public eye and had very limited authority to act on behalf of the company. It is inconceivable, in light of the purpose of the tolling statute, that the legislature intended to give the benefit of the statute of limitations to a foreign corporate defendant whose only representation within the state was by employees so invisible as these.

The second reason that Searle's rationale is not convincing is that it incorporates into the tolling statute changes in the law which were made after the act's passage. Narrowly drawn statutory language must be interpreted from the intent of the legislature in light of circumstances at the time of enactment. 2A *Sutherland*, Statutory Construction § 49.02 (4th Ed. 1973). "A new meaning may not be given the words of an old statute in consequence of changed conditions probably not foreseen by the Legislature." *Fidelity & Deposit Co. of Maryland* v. *Abagnale*, 97 N.J. Super. 132, 143-44, 234 A.2d 511, 518 (Law Div. 1967). The present tolling statute has its origins in an enactment of the Council and General Assembly of New Jersey on February 21, 1820. The foreign corporations exception was

added by amendment in 1949.[5] The only legislative history relating to the 1949 amendment is the introduction statement of the bill's sponsor, Assemblyman Mackey, which provides:

> Foreign corporations licensed to do business in New Jersey are now deprived by judicial construction of the benefit of the Statute of Limitations. The purpose of this bill is to correct that situation. New York State found it necessary to make a similar change in its laws in view of recent court decisions.

The import of this statement of legislative purpose is far from unambiguous, but it sheds some illumination on the phrase "any person or officer" as used in the tolling statute.

An understanding of Mackey's introductory statement requires an analysis of the New York law to which it refers. In 1949 New York's tolling statute was C.P.A. § 19, which had most recently been amended in 1943. Before 1943, § 19 had included an exception[6] from the tolling

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[5] Act of May 18, 1949, 1949 N.J.Laws, ch. 125 (amending N.J.R.S. 2:24-7 (1937); current version at N.J.S.A. 2A:14-22).

[6] Before 1943 C.P.A. § 19 provided in pertinent part:

> But this section does not apply while a designation made in pursuance of law of a resident of the state on whom a summons may be served for another person or corporation remains in force. Nor does this section apply while a foreign corporation has had or shall have one or more officers in the state on whom a summons for such corporation may be served.

N.Y.C.P.A. § 19 (1920), *as amend by* Act of Apr. 5, 1928, 1928 N.Y.Laws, ch. 809 (current version at N.Y.Civ.Prac.Law (McKinney) § 207 (1972)).

statute for persons or corporations with a designated agent for the service of process and foreign corporations with officers who might be served within the state. The 1943 amendment[7] to § 19 enlarged the exception to include persons or corporations with agents for service of process designated by statute or appointment and foreign corporations with "officers or other persons" who might be served. The revision notes appended to the amendment indicate that the foreign corporation exception was broadened to include persons besides officers who were servable pursuant to C.P.A. § 229. At that time, C.P.A. § 229,[8] governing

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[7] The amendment provided in pertinent part:

> But this section does not apply in either of the following cases:
>
> 1. while a designation or appointment, voluntary or involuntary, made in pursuance of law, of a resident or nonresident person, corporation, or private or public officer on whom a summons may be served within the state for another resident or nonresident person or corporation with the same legal force and validity as if served personally on such person or corporation within the state, remains in force.
>
> 2. while a foreign corporation has had or shall have one or more officers or other persons in the state on whom a summons for such corporation may be served.

Act of Apr. 3, 1943, 1943 N.Y.Laws, ch. 263.

[8] C.P.A. § 229 at that time provided in pertinent part:

> When any natural person or persons not residing in this state shall engage in business in this state, in any action against such person or persons arising out of such business, the summons may be served by leaving a copy thereof with the complaint with the person who, at the time of service, is in charge of any business in which the defendant or defendants are engaged within this state . . . .

Act of Apr. 15, 1941, 1941 N.Y.Laws, ch. 455, *amending* N.Y. C.P.A. § 229 (1920) (repealed 1962).

service on nonresidents engaging in business in New York State, permitted service on the person in charge of any business in which the defendant was engaged within the state. Interpreting the language of the 1943 amendment to C.P.A. § 19 in light of C.P.A. § 229, it appears that at most the amendment broadened New York's foreign corporation exemption to include companies represented within the state by statutory or appointed agents, officers or business managers. Since the New Jersey Legislature intended in 1949 to adopt a tolling exemption similar to New York's, the New Jersey Legislature could not have intended that an employee with no managerial authority, such as a detailman, could be a representative sufficient to bring a foreign corporation out of the tolling statute.[9]

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[9] Mackey's introductory statement to the 1949 amendment to the New Jersey tolling statute indicated that New York had amended its tolling statute in a similar fashion in response to recent court decisions. Research has disclosed no significant cases prior to 1943 regarding persons through whom a foreign corporation might be served. However, section 1 of the 1943 amendment to C.P.A. § 19, n. 5 *supra*, was adopted specifically to alter the rule of *Maguire* v. *Yellow Taxicab Corp.*, 253 A.D. 249, 1 N.Y.S.2d 749, *rehearing denied*, 253 A.D. 890, 2 N.Y.S.2d 1021, *aff'd mem.*, 278 N.Y. 576, 16 N.E.2d 110 (1938), which held that amenability to process through the Director of Motor Vehicles did not exempt a nonresident defendant from the tolling statute. These facts suggest that the New Jersey Legislature may well have intended that representation by a statutory agent within the state would be sufficient to satisfy the tolling statute's foreign corporation exemption. *See Ferraro* v. *Ferro Trucking Co.*, 72 N.J.Super. 519, 179 A.2d 74 (Law Div. 1962). *But see Whalen* v. *Young*, 28 N.J.Super. 543, 101 A.2d 64 (Law Div. 1953), *reversed on other grounds*, 15 N.J. 321, 104 A.2d 678 (1954); *Lackovic* v. *New England Paper Tube Co., Inc.*, 127 N.J.Super. 394, 317 A.2d 426 (Law Div. 1974). *Cf. Lemke* v. *Bailey, supra.*

Appendix C

This conclusion is strengthened by reference to the law in New Jersey regarding service on foreign corporations at the time of enactment of the New Jersey foreign corporation exemption. In 1948, a year before the tolling statute amendment, the legislature amended N.J.R.S. 2:26-43 and 44[10] providing for service on corporations. Those amendments permitted acquisition of personal jurisdiction over foreign corporations by service on an officer, director, trustee, managing or general agent or agent by appointment or by law for the service of process. A detailman with minimal agency powers could not be considered a

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[10] The 1948 amendment to N.J.R.S. 2:26-43 and 44 (1937) (repealed 1951) provided:

> 2:26-43. Domestic corporations in personal actions; personal or substituted service of summons.
>
> Service of a summons in a civil action commenced against a domestic corporation in any of the courts of this State may be made by delivering a copy thereof to an *officer, director, trustee or a managing or general agent of the corporation personally*, or by leaving a copy thereof at his dwelling house or usual place of abode with some competent member of his family of the age of fourteen years or over then residing therein, or by delivering a copy thereof to any person authorized by appointment or by law to receive service of process on behalf of the corporation, or by leaving a copy thereof at the registered office of the corporation with any person in charge thereof.
>
> 2:26-44. Foreign corporations.
>
> Service of a summons in a civil action commenced against a foreign corporation may be made in the same manner as is provided in section 2:26-43 of the Revised Statutes for service of summons upon a domestic corporation.

Act of Sept. 10, 1948, 1948 N.J.Laws, ch. 356.

managing or general agent, nor any other individual within the statutory list. Since in 1949 personal jurisdiction over a foreign corporation could not have been obtained by serving a detailman, the legislature could not have intended an exemption from the tolling provision for an entity represented by such an employee. Searle urges that N.J.S.A. 2A:14-22 be interpreted as consistent with the rule regarding service of process at the time of plaintiff's injury. Such an approach would be inappropriate, however, since the reach of service was substantially expanded in 1953, *Wright* v. *News Syndicate Co., Inc.*, 35 N.J. Super. 133, 135, 113 A.2d 215 (Law Div. 1955), a change which the legislature could not have anticipated in 1949.

[6, 7] Searle next takes the position that because Searle was at all times relevant to the instant complaint amenable to long-arm service,[11] it was represented within the state within the meaning of the tolling statute. The effect of amenability to long-arm jurisdiction on N.J.S.A. 2A:14-22 is a novel question heretofore not considered by the courts.

A number of courts have considered the construction of the New Jersey tolling provisions in light of a defendant's amenability to service through the Director of Motor Vehicles under the nonresident motorist statute, N.J.S.A.

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[11] New Jersey does not have a long-arm statute under the New Jersey Constitution of 1947, the Supreme Court has exclusive rule-making power over practice, procedure and administration of the courts. *Winbery* v. *Salisbury*, 5 N.J. 240, 74 A.2d 406 (1950). From 1963 to 1974, long-arm service was available over Searle pursuant to the court rules. R.R. 4:4-4(d) (effective Sept. 3, 1958); R. 4:4-4(c)(1) (effective Sept. 8, 1969) (current version).

39:7-2 (1973).[12] In the leading case, *Lemke* v. *Bailey, supra,* the New Jersey Supreme Court held that the tolling statute deprived a nonresident individual defendant of the benefit of the statute of limitations even though the defendant had been subject to service pursuant to N.J.S.A. 39:7-2. Searle argues that *Lemke* should not be considered controlling here because the Supreme Court specifically reserved the question of the effect of availability of substituted service upon a corporate defendant, and, in any case, there the court relied heavily on legislative acquiescence in, and plaintiffs' reliance on, prior court interpretation of the relationship between 2A:14-22 and 39:7-22 and 39:7-2, which consideration would be irrelevant to the novel question here presented. Plaintiffs urge that *Lemke* should be read broadly to hold that the statute of limitations does not run against a nonresident individual, and that *Lemke* binds the court here because there is no reason to treat individual and corporate defendants differently.[13]

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[12] Holding that amenability to service through the Director of Motor Vehicles does not entitle a nonresident defendant to the benefit of the statute of limitations are *Gotheiner* v. *Lenihan,* 20 N.J.Misc. 119, 25 A.2d 430 (Sup.Ct. 1942); *Whalen* v. *Young,* 28 N.J.Super. 543, 101 A.2d 64 (Law Div. 1953), *rev'd on other grounds,* 15 N.J. 321, 104 A.2d 678 (1954); *Lemke* v. *Bailey, supra; Lackovic* v. *New England Paper Tube Co.,* 127 N.J.Super. 394, 317 A.2d 426 (Law Div. 1974); *Blackmon* v. *Govern,* 138 F.Supp. 884 (D.N.J. 1956). *Contra, Ferraro* v. *Ferro Trucking Co., supra.*

[13] Plaintiffs cite two cases for the proposition that the tolling statute deprives a nonresident defendant of a statute of limitations defense despite amenability to substituted service. *Kenny* v. *Duro-*

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Test Corp., 91 F.Supp. 633 (D.N.J. 1950); *Mann* v. *Morristown Memorial Hospital*, Civ. No. L-23529-64 (N.J.Super., Law Div., filed Aug. 6, 1965, dismissed by consent Mar. 6, 1968). Neither case supports plaintiffs' argument. *Kenny* held that under the tolling statute a foreign licensed corporation could not plead the statute of limitations despite the fact that it was servable within the state. However, the court indicated that the 1949 foreign corporation exemption was only prospective in effect and therefore inapplicable to that case. *Id.* at 635-36.

On the other hand, the facts in *Mann* do not support the reading that plaintiffs give to its result. *Mann* was a malpractice action against a hospital and two doctors. The plaintiff was treated by the defendants until June 1963, when his cause of action accrued. *Tortorello* v. *Reinfeld*, 6 N.J. 58, 66, 77 A.2d 240 (1950). He filed his complaint on Aug. 6, 1965. Summary judgment was granted to two defendants on statute of limitation grounds, but denied as to Dr. Matthews, who had moved from New Jersey in August 1963 and been served under the long-arm rule. Plaintiffs herein assert that Matthews had been subject to long-arm service from the time of his departure, and, therefore, the denial of his motion for summary judgment represents a holding that the tolling statute always applies to a nonresident defendant despite amenability to sustituted service.

However, long-arm jurisdiction was not available against individual defendants until January 1964. R.R. 4:4-4(j) (effective Jan. 2, 1964) (current version at R. 4:4-4(e)). Assuming that the limitations period would ordinarily run during periods of absence when subject to substituted service, the statute ran against Matthews for two months in 1963 and then re-commenced to run in January 1964. By that calculation, the complaint was filed only some seven months into the limitations period, and the action was timely without the aid of the tolling statute. Thus, the disposition of Matthews' summary judgment motion does not reflect on the relationship between the tolling statute and substituted service.

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Amenability to long-arm service cannot be deemed to constitute representation within the state for the very same reason that the foreign corporation exemption is not triggered by he presence within the state of servants acting in the discharge of their duties. The narrow foreign corporation exception must be construed in light of legislative intent at the time of enactment. The tolling statute exemption was adopted in 1949. Although the Supreme Court had held four years earlier that the reach of state process could contitutionally extend beyond the territorial boundaries of a state, *International Shoe Co.* v. *State of Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), long-arm service was not adopted in New Jersey until 1958.[14] Further, the New Jersey courts have tended to construe the tolling statute narrowly so as not to incorporate subsequent broadening of the service laws. *See*, n. 12, *supra*. One court has held in the context of an individual defendant that amenability to long-arm service does not satisfy the tolling statute. *Fidelity & Deposit Co. of Maryland* v. *Abagnale*, *supra*, 97 N.J.Super. at 144, 234 A.2d 511. For these reasons, the foreign corporation section of the tolling statute cannot be construed to encompass extraterritorial service unknown to the legislature at the time of enactment and not within the intendment and scope of the statutory language.[15]

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[14] Long-arm service over corporations was adopted in 1958. R.R. 4:4-4(d) (effective Sept. 3, 1958). It was extended to individuals in 1964. R.R. 4:4-4(j) (effective Jan. 2, 1964).

[15] Searle has relied on cases construing the Ohio and Idaho tolling statutes to be inapplicable to foreign corporations subject to long-arm jurisdiction. *Partis* v. *Miller Equipment Co.*, 324 F.Supp. 898 (N.D.Ohio 1970); *Lipe* v. *Javelin Tire Co., Inc.*, 96 Idaho 723, 536 P.2d 291 (1975). The tolling statutes in those states provide for tolling when a person is "absent from the state." Such general language lends itself to a broader interpretation than the more restrictive wording of the New Jersey statute.

[8, 9] Finally, Searle argues that if the New Jersey tolling statute acts to deny the statute of limitations to a foreign corporation subject to long-arm jurisdiction, that statute violates the equal protection clause of the United States Constitution.[16] This, too, is an issue of first impression. Searle's position is that a statutory classification must bear a rational relationship to the purpose of the enactment to withstand an equal protection challenge. Where an out- of-state defendant is amenable to process, Searle argues that the purpose of the tolling statute is satisfied, and there is no reason to deny such a defendant the statute of limitations. While conceding that Searle is correct as to the equal protection standard, plaintiffs reply that the classification here under attack is rational because one of the purposes of the tolling statute is to penalize foreign unlicensed corporations by denying them repose to encourage domestication.[17]

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[16] Searle also makes a due process argument. Because of my holding on the equal protection question, I need not reach Searle's due process claim.

[17] Plaintiffs' position that the tolling statute was intended as a penalty to induce licensure is flawed. N.J.S.A. 14A:13-3(1) (1969) provides that a foreign corporation has no right to transact business within New Jersey without obtaining a certificate of authority from the Secretary of State. Where corporate activities do not meet the standard of "transacting business," registration is not required. *See* N.J.S.A. 14A:13-3(2); N.J.S.A. 14A:13-11 (1969); *Materials Research Corp.* v. *Metron*, 64 N.J. 74, 312 A.2d 147 (1973); *United States Time Corp.* v. *Grand Union Co.*, 64 N.J.Super. 39, 165 A.2d 310 (Ch.Div. 1960). Assuming, *arguendo*, that the tolling statute was intended to impose a penalty

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The thrust of the equal protection clause is the proscription of arbitrary discrimination between persons similarly situated. *Schmidt* v. *Board of Adjustment of City of Newark*, 9 N.J. 405, 88 A.2d 607 (1952). As more fully stated by the Supreme Court,

> the Fourteenth Amendment does not deny to the States the power to treat different classes of persons in different ways. *Barbier* v. *Connolly*, 113 U.S. 27, 5 S.Ct. 357, 28 L.Ed. 923 (1885), *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed. 369 (1911); *Railway Express Agency* v. *New York*, 336 U.S. 106, 69 S.Ct. 463, 93 L.Ed. 533

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on unlicensed foreign corporations, such a penalty would fall with equal weight on all foreign corporate defendants without representation by persons or officers, irrespective of the nature of their New Jersey activities. Because the standard of state contacts sufficient for long-arm jurisdiction is substantially lower than that for "transacting business," *Materials Research Corp.* v. *Metron*, *supra*, 64 N.J. at 84, 312 A.2d 147, the sanction of the tolling statute would be imposed on corporations which would not be required to register under N.J.S.A. 14A:13-3. While there may be some justification for denying the statute of limitations to corporations transacting business without registration, the tolling statute would reach a far greater class of corporate defendants and, as construed by plaintiffs, that statute would itself effect an irrational classification. Further, since state licensure may not be required of a foreign corporation which is involved in the state solely in interstate commerce, *Eli Lilly & Co.* v. *Sav-On Drugs, Inc.*, 366 U.S. 276, 278 & n. 7, 81 S.Ct. 1316, 6 L.Ed.2d 288 (1961), plaintiffs' reading of the tolling statute would run afoul of the commerce clause. I am aware of no provision imposing penalties for transacting business without a license other than N.J.S.A. 14A:13-11.

(1949); *McDonald* v. *Board of Election Commissioners*, 394 U.S. 802, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1969). The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 40 S.Ct. 560, 64 L.Ed. 989 (1920).

Reed v. *Reed*, 404 U.S. 71, 75-76, 92 S.Ct. 251, 253, 30 L.Ed. 2d 225 (1971). *Accord, N.J. Restaurant Association* v. *Holderman*, 24 N.J. 295, 131 A.2d 773 (1957).

As indicated, the purpose of the tolling statute is to preserve a plaintiff's cause of action where service cannot be effected upon the defendant on account of nonamenability to process. *Lemke* v. *Bailey, supra* (Schettino, J., dissenting); *Ferraro* v. *Ferro Trucking Co., supra.* Nothing in the legislative history or court construction of N.J.S.A. 2A:14-22 supports plaintiffs' assertion that a purpose of the statute is to penalize foreign unlicensed corporations to encourage licensure.[18]

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[18] While the sponsor's statement regarding the 1949 amendment indicated that the legislature intended to give the benefit of the statute of limitations to foreign licensed corporations, the language of the amendment is not so narrowly phrased as to deny unlicensed corporations a statute of limitations defense.

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The effect of the foreign corporation section of the tolling statute is to distinguish between domestic and foreign corporations subject to service through representative agents within the state and foreign corporations subject to service under the long-arm rule. The former are entitled to plead the statute of limitations while the latter are denied its reprose. Since this difference in treatment bears no rational relationship to the object of the tolling statute, I find that the statute denies equal protection to foreign corporations amenable to long-arm jurisdiction.[19] ***Cf. Lemke*** **v.** ***Bailey, supra*** **41 N.J. at 305-06, 196 A.2d 523 (Schettino, J., dissenting).**

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[19] While this holding is limited to corporate defendants, individuals are subject to long-arm jurisdiction in New Jersey, R.4:4-4 (e), and I agree with plaintiffs that "[t]here is no logical reason to treat corporate and individual defendants in a different manner." *Lackovic* v. *New England Paper Tube Co., Inc., supra,* 127 N.J. Super. at 398, 317 A.2d at 429. One court has held that it does not deny equal protection of the laws to apply a tolling statute to an individual defendant subject to substituted service pursuant to a nonresident motorist statute because of the latter statute's requirement of actual notice to the defendant for a personal judgment and the difficulty of locating an individual in another state. *Vaugn* v. *Deitz,* 430 S.W.2d 487 (Tex.1968). However, the burdens on plaintiffs found so onerous by that court are minimized in New Jersey practice. In New Jersey, an action is commenced by filing a complaint with the court, R. 4:2-2, and a summons is to be issued and served 10 days thereafter. R. 4:4-1. However, liberal relief is granted from the 10-day service rule where the plaintiff uses due diligence to find the defendant. *See Cooke* v. *Yarrington,* 62 N.J. 123, 299 A.2d 400 (1973); *X-L Liquors, Inc.* v. *Taylor,* 17 N.J. 444, 454, 111 A.2d 753 (1955). Thus, there is no prejudice to plaintiffs in requiring them to file a complaint within the limitations period where their cause of action will be preserved so long as they make reasonable efforts to find the defendant.

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One who by law is subject to a state's jurisdiction is effectively present and represented within that state. *Hurwitch* v. *Adams*, 151 A.2d 286 (Del.Super.Ct.), *aff'd* 52 Del. 247, 155 A.2d 591 (1959); *Bolduc* v. *Richards*, 101 N.H. 303, 142 A.2d 156 (1958); *Snyder* v. *Clune*, 15 Utah 2d 254, 390 P.2d 915 (1964). Where the long-arm rule places an out-of-state defendant on an equal footing with a resident or represented one, there is no rational justification for differential treatment of such defendants with regard to the statute of limitations. While the tolling statue made eminent good sense in the days of territorial restrictions on service, it has become dated in the instant context by modern changes in the law of in personam jurisdiction. The infirmity which the statute has developed in the course of the aging process is over-permissiveness: until today it allowed a plaintiff to postpone indefinitely the assertion of his cause of action even though the defendant was subject to service. As a matter of fair judicial administration, where a defendant may be brought before the courts, he should be permitted to assert the statute of limitations to implement the important policies behind that statute to spare defendants from being put to a defense after evidence is lost, memories have faded and witnesses have died or disappeared and to deliver the courts from the litigation of stale and possibly fraudulent claims. *Union City Housing Authority* v. *Commonwealth Trust Co.*, 25 N.J. 330, 335, 136 A.2d 401 (1957). The instant holding brings New Jersey law[20] into conform-

[20] I express no view on the rule of *Lemke* v. *Bailey*, *supra*, but note that any defendant subject to service under the New Jersey nonresident motorist statute, N.J.S.A. 39:7-2, is also amenable to long-arm jurisdiction.

ity with the rule in the majority of the states[21] that amenability to process by substituted or long-arm service renders the tolling statute inapplicable.

In light of the above result, it will become necessary to resolve the second issue tendered by the motion of defendant for summary judgment—whether plaintiffs are entitled to the benefit of the "discovery" rule in bar of the statute of limitations. There will be no necessity to enter an order on the motion until that question is resolved.

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[21] Of the 42 states which have considered the question, 38 take the majority position. *See* 94 A.L.R. 485 (1935); 119 A.L.R. 859 (1939); 17 A.L.R.2d 502 (1951); 55 A.L.R.3d 1158 (1974).

Contra:

New Jersey:

Lemke v. *Bailey*, 41 N.J. 295, 196 A.2d 523 (1963).

Ohio:

Couts v. *Rose*, 152 Ohio St. 458, 90 N.E.2d 139 (1950). However, the Ohio courts have taken a different approach to corporations. *See Partis* v. *Miller Equipment Co.*, 324 F.Supp. 898 (N.D.Ohio 1970), *aff'd*, 439 F.2d 262 (6th Cir. 1971).

S. Carolina:

Macri v. *Flaherty*, 115 F.Supp. 739 (E.D.S.C. 1953).

Texas:

Dietz v. *Vaughn*, 423 S.W.2d 113 (Civ.App. 1967), *aff'd*, 430 S.W.2d 487 (Tex. 1968).